

Award No. 6527

Docket No. CL-6577

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

LeRoy A. Rader, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES**

THE BALTIMORE AND OHIO RAILROAD COMPANY

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

1. Carrier violated and continues to violate the controlling Agreement between the parties at Perry, New York, when, effective with close of business on June 13, 1949, it discontinued a full-time 8-hour scheduled position of Receiving and Delivery Clerk and removed the work assigned thereto from the scope and operation of the Agreement by reassigning parts of such work to the Agent, an employe covered by the Telegraphers' Agreement, and later assigning 4 hours' work of trucking freight, work which was originally performed on the discontinued position, to an outsider who had no rights under the Clerks' Agreement; and

2. That Carrier shall now compensate the former incumbent, Clerk Amos W. Link, for one day's pay at the rate of his former position at pro rata for each day on June 14, 1949 and subsequent dates that the violation continued and further, claim to run until the condition is corrected by the Carrier's returning the disputed work and assignment thereof to employes covered by the Clerks' Agreement.

EMPLOYES' STATEMENT OF FACTS: At the close of business on June 13, 1949, Claimant's position was discontinued, although there still remained eight (8) hours' work thereon, which was necessary to be performed. The locale of this dispute is Perry, New York, where the Carrier maintains a freight house operation for the benefit of its patrons in that vicinity. Prior to the date of this dispute, the Carrier maintained the following positions at Perry Freight House and the duties assigned thereto are shown below:

Agent—assigned to Mr. George H. DeWitt under Telegraphers' Agreement

Hours of Service—7 A. M. to 4 P. M. (one hour lunch period)

Rate of Pay \$2.108 per hour in December, 1950

- (6) The principle of "ebb and flow" is expressly implied in the working contract.
- (7) The "contract trucker" performed no work which could even remotely be described as encroaching upon that of the abolished position or any other position.
- (8) For a few months in 1950 a group 3 position of part-time trucker was established at Perry; the claimant, Link, who had held a group 1 position was given the expressed opportunity to fill this particular position and expressly turned it down.

Based on all that has been said hereinabove, the Carrier submits that the claim made here at parts 1 and 2 is completely without merit. Furthermore, the Carrier asserts that this Division has no authority to make any order directly, or by indirection issue any verdict the net effect of which would be, to compel the Carrier to establish position or positions where none now exist. The Carrier respectfully requests this Division to find this claim as being without merit and to deny it accordingly.

OPINION OF BOARD: There is no material dispute relative to the facts presented in the record. Prior to the date mentioned in the claim, Carrier's station force at Perry, N. Y., consisted of Agent-Operator, Chief Clerk and a Receiving and Delivery Clerk. The first named position is under the Telegraphers' Agreement, and the other two positions are in the Clerks' Agreement. Effective June 14, 1949, Carrier discontinued the Receiving and Delivery Clerk position.

Petitioner's contention is based on the proposition that eight hours' work remained to be performed. Effective July 29, 1950, Petitioner states that Carrier hired an outsider to perform four hours of trucking freight, work performed by Claimant prior to the discontinuance of his position. Claimant was offered this four hour assignment and did not accept on the theory that there is nothing in the controlling Agreement requiring him to accept such an assignment.

In a joint check made, Petitioner contends it was shown that prior to July 29, 1950, the Agent and Chief Clerk performed all the checking and trucking of freight. That Carrier attempts to create the impression that the work of checking and trucking of freight was that of the Agent-Operator, but the duties of that position prior to the time in question do not include such work. The four hour assignment was worked from 8:00 A. M. to 12 noon and Petitioner contends the Agent or Chief Clerk handled the outbound freight received at the station between the hours of 1:00 P. M. to 5:00 P. M., which required about two hours per day and that additional work, including that of janitor, made this a full day's assignment.

Cited in support of the claim is Rule 1 (c) 1 which reads:

"(c) When a position covered by this agreement is abolished, the work assigned to same which remains to be performed will be reassigned in accordance with the following:

"1. To position or positions covered by this agreement when such position or positions remain in existence at the location where the work of the abolished position is to be performed."

That this rule clearly states the method of reassigning work and at the time in question there remained in existence at this location position of Chief Clerk and therefore it was Carrier's obligation to reassign all the remaining work to this position.

Respondent Carrier contends that no exclusive right exists to the position; that it was created to assist the Agent-Operator with his work and

under the "ebb and flow" doctrine when business decreases the work flows back to its source. That in such a situation Claimant and the Agent do the same types of work and none of it is distinguishable under any specific scope rule as being exclusive. That the four hour shift trucker was employed to work as needed and work was performed on three or four days of the week and the arrangement discontinued February 1, 1951.

Also that a question of jurisdiction of the Board is in question here on the proposition that notice should be given of these proceedings to the Agent at Perry, N. Y., and to his representative, The Order of Railroad Telegraphers, which Petitioner will not agree to and therefore the claim should be dismissed. Numerous awards and law cases are cited on this question.

On the jurisdictional question presented, we do not think that it applies in this case. We are here asked to interpret the Agreement between Carrier and Clerks, the rules are clear and unambiguous as to the method or methods by which such a situation may be handled with reference to abolishing positions and reassigning any remaining work to be performed. We are not taking a position away from any employe covered by another Agreement and therefore we have the parties "involved" in this dispute and the subject matter involved within our jurisdiction.

Also under the paragraph of the Railway Labor Act, as amended, relating to duties of Referees, it is stated that Referees are appointed under certain conditions, only for the purpose of making an award. Matters relating to "due notice" impose a duty on the Board not the Referee.

The claim must be sustained and Claimant would have to deduct such earnings from other sources during such time and deduction to be made in that amount.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

Claim sustained in accordance with Opinion.

AWARD

Claim sustained in accordance with Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 31st day of March, 1954.